Office - Supreme Court, U.S.
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82-869

No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

PHILIP ALAN FROUDE, et al.,

Petitioners,

vs.

EAGLE-PICHER INDUSTRIES, INC. et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether the continued and expanding conflict among the decisions of the United States Courts of Appeals for the First, Fifth, Sixth, and District of Columbia Circuits as to the proper trigger of general liability insurance coverage for asbestos-related injury claims should be resolved by this court in view of
   i) the parallel findings by each Circuit that the principles of state law are clear and do not differ;
   ii) the ever increasing burden upon the federal and state judiciaries arising from the multitude of declaratory judgment actions by both insurers and insureds seeking a jurisdiction by jurisdiction resolution of this question, which has resulted and will continue to result in varying interpretations of standard wording, and encourage forum shopping by the litigants;
   iii) the financial plight of both insurers and their asbestos related insureds (forcing a number into Chapter 11 Reorganization) directly attributable to the declaratory judgment litigation, the thousands of asbestos bodily injury and wrongful death suits, and continued doubts over insurance coverage for these suits;
   iv) the future legal and financial impact for non-asbestos areas of mass product liability litigation from the continued conflict over the application of general liability insurance to cumulative trauma claims.
2. Given the medical evidence concerning the etiology of asbestos-related injuries or disease, whether insurer liability under Comprehensive Liability Insurance Policies is triggered
   i) when a claimant is exposed to asbestos; (exposure position); or
   ii) when a claimant produces clinically evident or diagnosable disease (manifestation position); or
   iii) during the entire period a claimant is exposed to asbestos, as well as the time the asbestos particles remain "in

residence" in the lung up to the time of manifestation ("*Keene*" position).

3. Whether the courts below improperly countenanced a contrived controversy between the plaintiff and one of the defendant insurers to effectuate a scheme of forum shopping?

LIST OF PARTIES

Petitioners Philip Alan Froude, Turegum Insurance Company Ltd., and Excess Insurance Company were defendants in the district court and appellants and appellees in the First Circuit.* Petitioner Philip Alan Froude appears on his own behalf and as a representative underwriter on behalf of Certain Underwriters at Lloyd's, London who subscribed to certain policies of insurance issued to Eagle-Picher. In addition to petitioners, the defendants in the district court were Liberty Mutual Insurance Co., American Motorists Insurance Company, John Basil Thomas Bird on his own behalf and as representative of Certain Underwriters at Lloyd's, London; Walbrook Insurance Co., Ltd., Winterthur Swiss Insurance Company, Southern American Insurance Company, Mutual Reinsurance Company, Ltd., St. Katherine Insurance Co., Ltd., London and Edinburgh General Insurance Company, Ltd., Bermuda Fire and Marine Insurance Company (U.K.) Ltd., Dominion Insurance Company, Ltd., Yasuda Fire & Marine Insurance Company (U.K.) Ltd., Bellefonte Insurance Company, Mentor Insurance Company (U.K.), Ltd., Assicurazioni Generali London, Stronghold Insurance Company, Ltd., London & Edinburgh Insurance Company, National Casualty of America, Ltd., Accident & Casualty Insurance Company, Argonaut Northwest Insurance Company, Slater, Walker Insurance Company, Ltd. Eagle-Picher Industries, Inc. was the sole plaintiff in the district court. American Motorists Insurance Company was both an appellant and appellee as was Eagle-Picher Industries, Inc. The remaining parties were appellees.

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* Pursuant to Rule 28.1, petitioner Turegum Insurance Company is a wholly owned subsidiary of Zurich Insurance Company of Zurich. Turegum has no subsidiaries or affiliates. Excess Insurance Company is owned by Excess Insurance Group which is owned by ITT-Hartford Europe which is owned by Hartford Fire Insurance Company which is owned by International Telephone and Telegraph Company. Excess Insurance Company has no subsidiaries or affiliates.

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Petitioners Philip Alan Froude on his own behalf and as representative of Certain Underwriters at Lloyd's, London, Turegum Insurance Company, Ltd., and Excess Insurance Company respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the First Circuit entered on June 30, 1982.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the First Circuit appears in Appendix A herein at A7 and A3 respectively. The opinion is reported at 682 F.2d 12. The opinion and judgment of the United States District Court for the District of Massachusetts appears in Appendix B herein

at B3 and B2 respectively. That opinion is reported at 523 F. Supp. 110.

JURISDICTION

The opinion and judgment of the First Circuit was entered on June 30, 1980. On August 30, 1982 petitions for rehearing were denied and on September 1, 1982 suggestions for rehearing *en banc* were denied. Appendix A at A1, A2. Jurisdiction to review the judgment below is invoked pursuant to 28 U.S.C. § 1254(1). The action below was commenced pursuant to 28 U.S.C. § 2201.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The diversity clause of Article III Sec. 2, of the Constitution of the United States provides:

> The Judicial Power shall extend to all Cases, in Law and Equity . . . to controversies . . .—between Citizens of different States. . . .

Title 28 U.S.C. § 2201 provides:

> In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

In a case of actual controversy within its jurisdiction Title 28 U.S.C. § 1332 provides:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;. . . .

STATEMENT OF THE CASE

The instant case is essentially identical to over thirty cases pending in both federal and state courts in which the courts have been asked to determine who is ultimately responsible to defend and pay for the largest block of tort litigation in American judicial history. Appendix C. Manufacturers of asbestos products have been confronted with huge potential liability because of lawsuits filed by persons who inhaled asbestos fibers allegedly manufactured by the companies. The claimants have alleged that the manufacturer failed to warn asbestos workers and users of the asbestos products of the danger of exposure to asbestos, i.e., development of such conditions as asbestosis, mesothelioma or broncheogenic carcinoma.

Illnesses caused by asbestos are "latent", typically appearing 10–20 years after exposure to the product. Over the period of a manufacturer's production of asbestos products and during the time of an alleged claimant's exposure to asbestos products, up to the time of diagnosis of the asbestos-related injury or disease, the manufacturer may have been insured for products liability coverage by a number of insurers, with standard policy wording, but various limits of liability protection, and various deductibles for each policy period. The stated question in these declaratory judgment suits is which of the insurers shall be obligated to provide a defense to these lawsuits and which must indemnify the manufacturers for settlements or judgments?

As noted by the Sixth Circuit in its opinion in *INA v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *aff'd on rehearing*, 657 F.2d 814 (1981), *cert denied*, _ U.S. _, 102 S.Ct. 686 (1981) ["*Forty-Eight*"], the litigation "presents a novel

and important question of insurance law." 633 F.2d at 1213. With the decision of the First Circuit below, four Circuits have now attempted to resolve the question, resulting in three different and irreconciable interpretations of the standard policy wording. *Forty-Eight, supra; Porter v. American Optical Co.*, 641 F.2d 1128 (5th Cir.), *cert denied*, _U.S._, 102 S.Ct. 686 (1981) ["*Porter*"]; *Keene Corp. v. INA*, 667 F.2d 1034 (D.C. Cir. 1981), *rev'g*, 513 F. Supp 47 (D.D.C. 1981), *cert. denied*, _ U.S. _, 102 S.Ct. 1644 (1982) ["*Keene*"]

In the instant case, Eagle-Picher Industries, Inc. ["Eagle-Picher"], a manufacturer of insulation products, commenced a declaratory judgment action to determine whether its primary general liability insurance contracts, and first and second layer excess insurance contracts, for the period 1968 through 1978, would be obligated to provide coverage for third party claims, asserted against Eagle-Picher, seeking recovery for personal injuries or death allegedly caused by exposure to Eagle-Picher asbestos-containing products.[1]

Resolution of the insurance coverage question is dependent upon the construction to be afforded to standard comprehensive general liability policies which provide indemnification for personal or bodily injuries caused by an "occurrence." Paraphrasing the policy wording, for purposes of brevity in this petition, "occurrence" is defined as "an accident or continuous or repeated exposure to conditions" which "results during the policy period" in "personal injury." Personal injury is defined as comprising "bodily injury, sickness or disease." An insurer's liability is, therefore, based upon the happening of bodily injury, sickness or disease during the policy period.

Before the District Court, Eagle-Picher, and two of its insurers, argued that the insurance contracts in effect when the third party claimant's asbestos-related disease first manifested itself

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1. At the time of filing this action, Eagle-Picher alleged that it had been named a defendant in 1800 lawsuits seeking in the aggregate, damages of over one hundred million dollars ($100,000,000). By November 1981, Eagle-Picher alleged that more than 11,000 claims had been filed and that new claims were being filed at the rate of almost 500 per month.

by discoverable and diagnosable signs or symptoms should be obligated to indemnify Eagle-Picher for such claims ["manifestation position"]. Proponents of the manifestation position contend that a bodily injury, sickness, or disease does not occur until it manifests itself and only at that time is coverage for claims arising from the disease triggered. Therefore, they argue, evidence of subclinical injuries during the period of a claimant's asbestos exposure would be insufficient to trigger coverage from those insurers affording coverage to the manufacturer during the exposure period.

In contrast to the manifestation position, petitioners, together with another Eagle-Picher insurer, argued that inasmuch as injury, albeit subclinical, occurs nearly simultaneous with exposure and inhalation of asbestos particles, and inasmuch as a cumulative disease, such as asbestosis, is a functional impairment arising from an accumulation of the subclinical injuries (i.e. scarring), the insurers affording coverage during the claimant's period of exposure to asbestos should afford coverage for claims arising from such exposure-induced injuries ["exposure position"]. Petitioners further contended that the date of manifestation of a disease or injury bears no relationship to the date when a disease or injury occurs, the latter date constituting the operative date under the policy for the triggering of coverage. Two federal circuit courts and one district court decision, which had adopted the exposure position, were cited in support of petitioners' argument. *Forty-Eight, supra; Porter, supra; Keene, supra,* 513 F. Supp. 47 (D. D.C.1981).

In addition, petitioners disputed the existence of a case or controversy between Liberty Mutual and Eagle-Picher, a requisite to the court's exercise of jurisdiction under Article III Sec. 2 of the Constitution. Petitioners argued that a special agreement between these two parties, as to the interpretation to be given the Liberty Mutual insurance contracts, effectively resolved any controversy between them which would require declaratory relief.

Furthermore the absence of Liberty Mutual, the sole Massachusetts based party in the litigation, would remove the only

nexus between the action and Massachusetts. Liberty Mutual's removal from the action would, therefore, be a significant factor in support of petitioners' contention that the appropriate forum for the resolution of the dispute was Ohio, the corporate home of the plaintiff. Petitioners asked the district court below not to sanction the blatant example of forum shopping by the plaintiff, intended to avoid the adverse Sixth Circuit "exposure" decision in *Forty-Eight*. Petitioners' motions were summarily rejected by the District Court.

After a trial limited to the introduction of the policies, and medical testimony as to the etiology of asbestos-related diseases, the District Court declared in a memorandum of decision issued on August 14, 1981 that the "operative date for determining which of the several policies in suit apply to a given claim or lawsuit in which damages are sought from plaintiff, Eagle-Picher Industries, Inc., is the date of actual diagnosis of the asbestos-related disease or, with respect to those cases in which no diagnosis was made prior to death, the date of death." Opinion Appendix B at B2. In adopting the manifestation position the court noted and differed with the opinions and findings of both the Sixth Circuit and Fifth Circuit in *Forty-Eight, supra*, and *Porter, supra*, respectively, and the then "exposure" decision of the District Court in *Keene, supra*.

Subsequent to the District Court decision below, the D.C. Circuit reversed the "exposure" decision of the lower court in *Keene* and expanded the trigger of coverage to include the period subsequent to a claimant's exposure up to, and including, the date of manifestation. In an appeal from the District Court decision below, Eagle-Picher urged the First Circuit to reverse the lower court and adopt the *Keene* interpretation, while petitioners continued to urge reversal based on the "exposure" position.

In a decision rendered on June 30, 1982, the First Circuit affirmed the "manifestation" decision of the District Court, while modifying the decision to the extent that the operative date would be when the "asbestos-related disease became reasonably capable of medical diagnosis." Opinion Appendix A at A4. While

recognizing the absence of any true conflict among the potentially applicable state laws, and the existence of certain basic principles of contract interpretation, the Court indicated that it would seek to be consistent with Illinois and Ohio law. However, the First Circuit, as did the District Court below, explicitly rejected the Sixth Circuit's analysis of both the policy language and medical evidence in *Forty-Eight* which the Sixth Circuit indicated was based upon an application of Illinois law. *Forty-Eight, supra,* 633 F.2d at 1219. In addition, the First Circuit below rejected the applicability of the D.C. Circuit interpretation of comparable contract language in *Keene.*

Finally, the First Circuit rejected petitioners' argument that since there was no controversy between Eagle-Picher and Liberty Mutual, the District Court erred in adjudicating the case.

REASONS FOR GRANTING THE WRIT

I. THE CLEAR CONFLICT AMONG THE DECISION OF THE FEDERAL CIRCUITS AS TO THE CONSTRUCTION OF STANDARD INSURANCE CONTRACT LANGUAGE AND THE MAGNITUDE AND NATIONAL SCOPE OF THE QUESTION WARRANTS REVIEW AND RESOLUTION BY THIS COURT.

Review of the First Circuit decision below by this Court is clearly warranted since the resulting conflict among the four federal circuits[2] to consider the question of general liability insurance coverage for claims for asbestos-related injuries arises from the same matter of law and fact; the magnitude of the question presented and the number of parties affected poses a significant public question; and the importance of the question lies beyond the parties involved below.

This Court has been asked in *Forty-Eight, Porter,* and *Keene* to intervene and resolve this novel and important issue. Each

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2. Court of Appeals for the Fifth *(Porter, supra)*, Sixth *(Forty-Eight, supra)*, D.C. *(Keene, supra)* and First Circuits *(Eagle-Picher)*.

time the Court has denied the petitions for writs of certiorari. Time has not, however, witnessed signs of early resolution of the issue in the federal or state courts. In fact, each successive decision has only deepened the imbroglio characterizing the asbestos coverage issue. These decisions have encouraged and promoted the filing and prosecution of litigation in the courts and delayed the required focus of resources and attention on disposing of the thousands of underlying asbestos cases. Each denial of certiorari has resulted in a further financial deterioration of many of the asbestos manufacturers.

The expanding conflict among the federal circuits culminating with the First Circuit decision in *Eagle-Picher* clearly calls now, if never before, for review by this Court to provide consistent federal application of similar state law.

The dispute over construction and application of general liability insurance to asbestos-related claims, and implicitly all long term exposure claims, constitutes one of the most serious and far reaching controversies to face American industry, both product manufacturers and their insurers. Over the years, 50 or more insurance companies have written general liability coverage for the asbestos industry and it is estimated that there are at least 16,000 plaintiffs in 10,000 cases suing asbestos manufacturers and suppliers, who in turn are expecting indemnification from their insurers[3] or who will be required to make their own payments because the entire industry cannot agree on the application of coverage to these claims.[4] It has been further esti-

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3. Asbestos Lawsuits Spur War Among Insurers With Billions at Stake, The Wall Street Journal, June 14, 1982 at 1; Asbestos Claims: The Debate Goes On, Business Insurance, April 5, 1982 at 3.

4. In its Chapter 11 Bankruptcy filing Johns-Manville Corporation estimated its potential financial burden over the next twenty years as ranging from anywhere between $2 billion to many times that amount. This estimate was based upon the continued questions as to insurance coverage coupled with the continued growth in the number of asbestos cases and the level of the disposition costs. The cumulative average for all claims disposed of through June 30, 1982 was $16,600 per claim. The costs of disposition of all claims including 23 verdicts on appeal result in an average cost of $20,690 per claim. As of June 30, 1982 Johns-Manville was a defendant in 11,000 suits brought by approximately 15,500 individual plaintiffs. Affidavit of James F. Beasley, *In re Johns-Manville Corporation*, 82 B 11556 (S.D.N.Y. filed August 26, 1982).

mated that within 25 years asbestos claims will exceed $39–$74 billion.[5]

Judicial interpretation of virtually standardized language will leave its mark on the handling of a wide array of present and future non-asbestos claims. At least 500 products have been identified as potential carcinogens which are likely to result in product liability litigation similar to the asbestos litigation.[6] Clearly the payment of an inestimable sum of money lies in the balance.

Insurers and insureds have been obviously unsuccessful in resolving the insurance construction problems as evidenced by their resort to the judicial process. Lack of uniform direction from the federal circuit courts which have considered the asbestos coverage question has prompted the filing of actions to resolve similar insurance questions for such products as the drug DES and the chemical defoliant Agent Orange.[7] Inconsistent judicial interpretation of standard policy language has created, and will continue to create, undue confusion and uncertainty in claims handling for both insureds and their insurers. In turn, further policy litigation and rampant forum shopping will be encouraged.[8]

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5. The Wall Street Journal, *supra* at 18; Asbestos Litig. Rptr., February 26, 1982 at 4616.

6. When Lawyers Prosper, Forbes, March 30, 1981 at 43; Toxic Nightmares for Victims, Companies, Courts, U.S. News & World Report, June 14, 1982 at 63.

7. DES: *Eli Lilly v. The Home Ins. Co., et. al.*, Civil Action No. 82-0669 (D.D.C. filed March 9, 1982); *Schering v. The Home Ins. Co.*, 544 F.Supp. 613 (E.D.N.Y. 1982); *Aetna Casualty & Surety Co. v. Abbott Laboratories*, Civil Action H-82-243 (D.Ct. filed February 26, 1982); *E.R. Squibb v. American Motorists*, No. 82-0740 (D.D.C. filed July 21, 1982); Agent Orange: *Hercules Inc. v. Aetna Casualty & Surety Co.*, Civil Action 82-0854 (D.D.C. filed March 26, 1982); FBB (fire retardant): *Michigan Chemical Corp. v. Travelers Indemnity*, 530 F.Supp. 147 (W.D. Mich. 1982); Drug Induced Birth Deformity: *TransAmerica Ins. Co. v. Bellefonte Ins. Co.*, 490 F.Supp. 935 (E.D. Pa. 1980).

8. Subsequent to the First Circuit's rejection of the *Keene* construction for Eagle-Picher policies of insurance, Eagle-Picher filed a declaratory judgment action in the United States District Court for the District of Columbia against certain excess insurers, not party to the Massachusetts action. *Eagle-Picher v. Amer. Employers Ins. Co.*, Civil No. 82-1841 (D.D.C. filed June 30, 1982).

Since the filing of the first declaratory judgment action in the Sixth Circuit, the number of declaratory judgment actions pending in both federal and state courts has grown to over 30 suits, all seeking resolution of the same question.[9] Without clear directive from the courts and, as ever needed, from this Court, the affected parties will be compelled to adjudicate the coverage issue case by case, and jurisdiction by jurisdiction. Furthermore, continued doubts over coverage, and the protracted delay in the resolution of the declaratory judgment actions with, in one case, as many as 27 insurers battling with their insured, have precipitated a number of bankruptcy filings, such as by Johns-Manville Corporation, a billion dollar corporation and the largest manufacturer of asbestos products.[10]

Clearly, the conflict over construction of standard occurrence language makes it impossible for insurers to rationally administer their policies and for the manufacturers to conduct financial long range planning and investment. Standard policy wording can no longer be susceptible to consistent application for substantially identical claims. Rather, construction and application of the insurance contract will depend upon such variables as the likely forum to adjudicate each potential insured-insurer dis-

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Given Eagle-Picher's dissatisfaction with the position of the First Circuit, a forum it chose over the Sixth Circuit and the circuit of its corporate headquarters, Ohio, the complaint filed in D.C. seeks application of D.C. Circuit precedent, enunciated in *Keene*, to the policies of the excess insurers named as defendants in the District of Columbia. Eagle-Picher is one of many insureds who, in the aftermath of the favorable ruling in *Keene*, rushed to file their declaratory judgment actions in the District of Columbia.

9. See Appendix C herein.

10. In re *Johns-Manville Corporation*, Case No. 82-B-11656 (S.D.N.Y. August 26, 1982). In addition, Unarco Industries and Amatex Corporation have filed for Chapter 11 reorganization. *In re Unarco Industries Inc.*, Case No. 82 B 0984 (N.D. Ill. July 29, 1982); *In re Amatex Corporation*, Case No. 82-05220 (E.D. Pa. November 9, 1982).
The financial plight of the asbestos litigation defendants is further exemplified by the recent downgrading of the securities ratings of a number of the defendant companies by the two major rating services, Moody's Investors Service Inc. and Standard & Poor's. A Moody's spokesman indicated that the reductions were based upon continued asbestos litigation and the proliferation of competing theories of insurance coverages. *See*, Asbestos defendant's bond ratings cut, Business Insurance, November 1, 1982 at 1; Asbestos Suits Divide Insurers, New York Times, September 7, 1982, Section D at 2.

pute. The irreconcilable holdings of *Forty-Eight*, *Porter*, *Eagle-Picher*, and *Keene*, have left the manufacturers, their insurers and claimants with inconsistent burdens and rights that warrant this Court's intervention.

These inconsistencies will pose problems for all insurers, such as the petitioners, who write coverage across the nation. Furthermore, they create a dilemma for the insured who must request contribution from all its insurers under each interpretation of coverage only to be thrown into litigation as the insurers correctly defer recognizing coverage until a court defines specific insurer liability and burdens and chooses from the three present theories, or from any other theory which may eventually be formulated in another jurisdiction until this Court acts. Moreover, there will be races to the courthouse as actions are initiated in those forums most favorable to the result sought by the initiating litigants, an inappropriate criterion that has more to do with the variable liability of an insurer under the present conflicting theories than with considerations of proper construction of insurance contracts.

As an insurer in all four actions reaching the appellate level, the dilemma of the respondent Liberty Mutual serves as an excellent example of the administrative nightmare created by these divergent holdings. In Massachusetts, Liberty Mutual must employ the manifestation approach, in the Fifth and Sixth Circuits the exposure/pro-rata interpretation, and in the District of Columbia the interpretation that an insurer is on the risk from the time the claimant was first exposed to the asbestos product through the time the asbestos-related injury becomes manifest. In addition, the burdens on an insurer in each jurisdiction differ. The D.C. Circuit determined that the insured may choose any one insurer over the entire applicable period for indemnification leaving the question of contribution from other applicable policies up to the designated insurer. Furthermore, the insureds would be relieved from any contribution for settlement or judgment costs, or costs of defense, for triggered years in which no insurance was in existence. The Fifth and Sixth Circuits explicitly rejected this approach.

The decisions in *Forty-Eight*, *Porter*, *Keene*, and *Eagle-Picher*

are not ordinary diversity decisions for which this Court may accept the conflict as "merely corollary to a permissible difference of opinion in the state courts." *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 206 (1938). In deciding the coverage issue the circuits have uniformly noted a false conflict of law and have applied general principles of insurance construction.[11] However in *Eagle-Picher*, the First Circuit adopted a manifestation interpretation, noting the applicability of Ohio and Illinois law, while the Sixth Circuit adopted the exposure interpretation likewise applying Illinois law. Furthermore, the disparate holdings in each of the four actions have been based upon inconsistent findings of fact evolved from identical medical evidence concerning the etiology of asbestos-related injuries or diseases.[12]

The opinions of the circuits should not be reconciled on the basis of maximizing the coverage of the insured. Resolving the coverage question on such a basis clearly misapprehends the minimal equitable considerations involved in resolving commercial lines insurance disputes and improperly applies, in the context presented, the rule of construction in favor of the insured.[13] Petitioners contend that it is patently absurd that stand-

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11. Opinion Appendix A at A10 fn. 2. *Keene, supra*, 667 F.2d at 1041 fn. 10, citing R. Leflar, American Conflicts of Law 188 (3d Ed. 1977). In *Porter* the Fifth Circuit adopted, without discussion, the reasoning and result of *Forty-Eight*, 641 F.2d at 1145.

12. Both the Sixth Circuit and the district court in *Forty-Eight*, as did the district court and the First Circuit in this action, held that the medical evidence was not in dispute. Opinion Appendix A at A12; Opinion Appendix B at B11; *Forty-Eight, supra*. The Sixth Circuit however found that "(t)he medical testimony strongly supports the exposure theory." 633 F.2d at 1218. The Sixth Circuit further recognized that there was "universal medical agreement that the time when asbestosis manifests itself is not the time when the disease occurred." 633 F.2d at 1219. In accord, the findings of the district court in *Keene, supra*, 513 F. Supp. at 49, and the unreported memorandum decision of the district court in *Commercial Union v. Pittsburg Corning Corp.*, No. 81-2129 (E.D. Pa. Dec. 4, 1981). Both the First Circuit and district court below recognized their straight forward disagreement with the "exposure" courts on the evaluation of the medical evidence. See opinion Appendix A at A21; Opinion Appendix B at B16 fn. 9.

13. The initial basis, however, for the holdings below, and in *Forty-Eight*, was the respective analysis of the policy language and the medical evidence. Opinion Appendix A at A20 (" . . medical testimony and the plain meaning of

ard policy language issued to an insured such as Eagle-Picher should take on a totally different meaning from that of identical wording issued to Forty-Eight Insulations simply because of the particular insurance history of each insured. The purpose of each policy is the same, and the intent of the insurer, by use of identical wording, is the same. Yet for asbestos-related claims asserted against Eagle-Picher, the injury must have manifested itself to trigger coverage while for an identical claim against Forty-Eight Insulations, coverage is triggered when the injury occurred, during the claimant's exposure to the asbestos product.

Only the existence of serious equitable considerations can serve to justify such an inconsistent application of policy language. While these considerations may be present in disputes over personal lines insurance they are absent in the commercial lines context.[14] Consistency in the application of standardized "occurrence" wording to a particular injury or disease must be

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the policy language strongly supports the manifestation approach."); Opinion Appendix B at B11, B12; *Forty-Eight, supra*, 633 F.2d at 1218.

14. *See, Eastern Associated Coal Corp. v. Aetna Casualty & Surety Co.*, 632 F.2d 1068, 1075 (3d. Cir.), *cert. denied* _ U.S. _ , 101 S. Ct. 2320 (1980) ("The principle that . . . [insurance] policies should be strictly construed against the insurer does not control the situation where large corporations advised by counsel and having equal bargaining power, are the parties to a negotiated policy."). The observation of the Fifth Circuit in *Eagle Leasing Corp. v. Hartford Fire Ins. Co.*, 540 F.2d 1257, 1261 (5th Cir. 1976) *rehearing denied* 546 F.2d 906, *cert. denied*, 431 U.S. 967 (1977) is particularly relevant in the context of these actions.

> "We do not feel compelled to apply, or, indeed, justified in applying the general rule that any insurance policy is construed against the insurer in the commercial insurance field when the insured is not an innocent, but a corporation of immense size, carrying insurance with annual premiums in six figures, managed by sophisticated businessmen, and represented by counsel on the same professional level as counsel for insurers . . . It is true, of course, as the trial judge observed, 'scriveners of insurance policies are acutely aware of the meaning and effect of the language.' We comment: So too, are counsel for large companies carrying fleet insurance with annual premiums in six figures. There is no purpose in following a legal platitude that has no realistic application to a contract confected by a large corporation and a large insurance company each advised by competent counsel and informed experts." 540 F.2d at 1261.

achieved. The unvarying element in the asbestos coverage dispute is the medical evidence, and this evidence alone should serve as a basis for consistent application of coverage.

Petitioners continue to rely on the findings and holdings of the Fifth and Sixth Circuits, as well as the medical evidence proffered below, that conclusively established that the asbestos-related injury occurs either simultaneously or so nearly so with the period of exposure to asbestos; that although subclinical injuries may not be an inevitable by-product of all exposure to asbestos, each claim and impairment is proof of the occurrence of injuries during exposure; that the "disease" of asbestos is more accurately described as a cumulative trauma with each injury occurring during exposure as significant as the preceding or subsequent injury; and that the date of manifestation of "bodily injury", the operative date adopted by the District Court below and affirmed by the First Circuit, is logically and factually unrelated to when the "bodily injury" occurred.[15]

The medical evidence in support of petitioners' contentions mirrors the records relied upon in the "exposure holdings" of the district court and circuit court in *Forty-Eight*, the district court in *Keene*, and the district court in *Commercial Union*. Conspicuous by its absence in both the First Circuit's opinion, and the opinion of the district court below, is an equally extensive citation to the record to support the contradictory findings concerning the etiology of asbestos-related injuries.

Petitioners contend that given the evidence of injury during exposure and the nature of cumulative diseases, such as asbestosis, the policy language supports the exposure position. This position is based upon the clear mandate of the policy wording, that coverage is to be afforded by insurance contracts in effect when a bodily injury occurs, not when the injury manifests itself.

The magnitude and national scope of the dilemma created by the conflict in the opinions of the First, Fifth, Sixth and D.C. Circuits, on the same matter of law and facts, is beyond debate.

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15. *See also*, the district court decision in *Commercial Union*, *supra*.

An entire industry of insurers and product manufacturers and, indirectly, thousands of claimants will be affected by the exercise of this Court's power of supervision. With the First Circuit's adoption below of yet a third interpretation of standard policy wording, the need is clear, and the time is ripe for review of this important coverage issue by this Court.

II. THE COURT OF APPEALS IMPROPERLY COUNTENANCED A SCHEME OF FORUM SHOPPING BY ITS FAILURE TO RECOGNIZE THE ABSENCE OF ANY "CONTROVERSY" BETWEEN EAGLE-PICHER AND LIBERTY MUTUAL THEREBY AVOIDING AN EXAMINATION AS TO THE APPROPRIATE FORUM FOR THIS LITIGATION

The prosecution of the instant litigation in Massachusetts rather than in the Southern District of Ohio is an example of blatant forum shopping encouraged by the absence of any consistent judicial construction of policy language as it relates to coverage for asbestos-related injury claims. The courts below inappropriately permitted the prosecution of an action between Liberty Mutual and Eagle-Picher without the existence of a requisite "controversy". Furthermore, an examination of the litigation's contacts with Massachusetts, in the absence of Liberty Mutual from the litigation, would have revealed the inappropriateness of Massachusetts as the forum.

Article III, Section 2 limits the exercise of the federal judicial power to "cases" and "controversies". Furthermore, this Court has consistently maintained that "[t]he requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit." *Federation of Labor v. McAdory*, 325 U.S. 450, 461 (1945). Petitioners contended below that no case or controversy existed between Eagle-Picher and Liberty Mutual. Furthermore the feigning of a controversy in this litigation could only be attributed to Eagle-Picher's effort to avoid litigating its manifestation position on the coverage issue in the Sixth Circuit, the circuit of its Ohio corporate residence, and the circuit which rendered an expo-

sure decision in *Forty-Eight*. Liberty Mutual provided the litigation's only nexus with the District of Massachusetts and, therefore, Liberty Mutual's absence from the litigation would warrant the action's transfer to a forum with a more significant relationship to the litigation, such as Ohio.

The First Circuit dismissed petitioners' contentions, clearly misapprehending crucial facts pertaining to the existence of a case or controversy between Eagle-Picher and Liberty Mutual. The First Circuit therefore never addressed the questions raised by petitioners as to the propriety of Massachusetts as the forum for this litigation. Opinion Appendix A at fn.1. Petitioners contend that the district court below and the First Circuit failed to appreciate the significance of a letter of agreement between Liberty Mutual and Eagle-Picher, which set forth a mutually agreed interpretation of the Liberty Mutual contract of insurance. Accordingly, there was no issue to be resolved between those parties in the instant declaratory judgment action.

Petitioners contend that the circuit court below greviously erred in observing that the Liberty Mutual policy was "the heart of the case." Opinion Appendix A at A8 fn. 1. In fact, in light of the agreement the sole issue was the construction of the American Motorists and London Market policies. Only these insurers and Eagle-Picher, as the insured, were parties to these contracts, and only these parties were affected by the court's declaration. The court's determination has no effect on Liberty Mutual's relationship with Eagle-Picher.

Furthermore, contrary to implication in the opinion below neither Liberty Mutual nor American Motorists, nor the London Market, could enforce or challenge the other's respective obligations to Eagle-Picher. As a result of the agreement, Liberty Mutual was insulated from any challenge to its claims handling practices for asbestos-related injuries.

In the clear absence of any controversy, Liberty Mutual's presence in this litigation should not have been countenanced. *Muskrat v. United States*, 219 U.S. 346, (1911); *Chicot County Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940). Liberty Mutual's inclusion in this litigation was clearly part of a forum

shopping scheme, affected the outcome of the case and was in contravention of the lower court's jurisdiction.

In the absence of a justiciable controversy between Eagle-Picher and Liberty Mutual, the District of Massachusetts bore no actual, significant, or substantial relationship to the only claims genuinely in dispute, that is, the determination of the respective rights and obligations of Eagle-Picher, and the American Motorists, and the London Market policies. A legion of federal courts have held that a plaintiff's choice of forum should be accorded reduced weight in the absence of any significant relationship between the forum district and the subject matter of the litigation.[16] This position has been especially advanced where, as here, the plaintiff commenced suit in a district which is neither its place of incorporation nor principal place of business. *Wibau, Westdeutsche Industrie v. American Hoist & D. Co.*, 293 F. Supp. 273, 275 (S.D.N.Y. 1968). Where the plaintiff's choice of forum has been motivated by "forum shopping", as alleged in this case, the federal courts have demonstrated no respect or deference to that choice. *Polaroid Corp. v. Casselman*, 213 F. Supp. 379, 383 (S.D.N.Y. 1962). None of these factors, however, were closely examined, as they should have been, in view of the district court and First Circuit's improper refusal to dismiss Liberty Mutual from this action.

This Court should grant this petition to closely examine the relationship of the parties, the existence of justiciable controversies, and the appropriateness of the forum to ensure that the constitutional standards of federal jurisdiction have been strictly followed.

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16. *Pacific Car and Foundry Co. v. Pence*, 403 F.2d 949, 954 (9th Cir. 1968); *ROC, Inc. v. Progress Drillers, Inc.*, 481 F. Supp. 147, 151 (W.D. Okl. 1979); *Helfant v. Louisiana & Southern Life Ins. Co.*, 82 F.R.D. 53, 57 (S.D.N.Y. 1979); *Abramson v. INA Capital Management Corp.*, 459 F. Supp. 917, 921 (E.D.N.Y. 1978); *Pope v. Missouri Pac. R. Co.*, 446 F. Supp. 447, 450 (W.S. Okl. 1978); *Goodman v. Schmalz*, 80 F.R.D. 296, 302 (E.D.N.Y. 1978); *Foster v. Litton Industries, Inc.* 431 F. Supp. 86, 87 (S.D.N.Y. 1977); *DeLay & Daniels v. Allen Campbell Co.*, 71 F.R.D. 386, 371 (D.S.C. 1976); *Josephson v. McGuire*, 121 F. Supp. 83, 84-85 (D. Mass. 1954).

CONCLUSION

The decisions below are appropriate for review by this Court for the reasons stated herein and Petitioners pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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November 16, 1982